

1 **LAW OFFICES OF DALE K. GALIPO**

2 Dale K. Galipo (SBN 144074)
3 Email: dalekgalipo@yahoo.com
4 Hang D. Le (SBN 293450)
5 Email: hlee@galipolaw.com
21800 Burbank Blvd., Suite 310
Woodland Hills, CA 91367
Tel: (818) 347-3333
Fax: (818) 347-4118

6 Bradley C. Gage, Esq. (SBN 117808)
7 brad@bradgagelaw.com

8 **BRAD GAGE LAW**

9 A Professional Corporation
23002 Victory Boulevard
Woodland Hills, California 91367
Tel.: (818) 340-9252/Fax: (818) 340-9088

10 Attorneys for Plaintiffs

11 **X.D. & X. C. THROUGH GAL TRACIE HALL**

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15

16 X.D. BY AND THROUGH
17 GUARDIAN AD LITEM TRACI
18 HALL, INDIVIDUALLY AND AS
19 SUCCESSOR IN INTEREST TO
20 NIANA FINLAYSON, DECEASED,
individually; S.C. BY AND
21 THROUGH GUARDIAN AD LITEM
22 KENNETH COTTON
INDIVIDUALLY AND AS
23 SUCCESSOR IN INTEREST TO
24 NIANI FINLAYSON, DECEASED,
individually,

25 Plaintiffs,

26 vs.

27 COUNTY OF LOS ANGELES;
DEPUTY TY SHELTON; and DOES
1-10, inclusive,

28 Defendants

Case No. 8:24-cv-00902-FWS-PVCx

Honorable Fred W. Slaughter

PLAINTIFFS' UNOPPOSED EX
PARTE APPLICATION FOR
RELIEF FROM ORDER RE
STIPULATION AND REQUEST
FOR ORDER OF DISMISSAL [DKT.
NO. 64] PURSUANT TO FED. R.
CIV. P. 60(b)(6)

[Declaration of Hang D. Le and
Proposed Order filed concurrently]

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

Plaintiffs X.D., by and through guardian ad litem Traci Hall, individually and as successor in interest to Niani Finlayson, deceased, and S.C., by and through guardian ad litem Kenneth Cotton, individually and as successor in interest to Niani Finlayson, deceased (“Plaintiffs”) hereby move by way of this Unopposed Ex Parte Application for Relief from the Court’s Order re Stipulation and Request for Order of Dismissal (Dkt. No. 64) pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Plaintiffs make this application pursuant to Central District Local Rule 7-19. The grounds for this application are set forth in the Memorandum of Points and Authorities, which follows below, and the Declaration of Hang D. Le, which is submitted concurrently herewith. Prior to filing this Ex Parte Application, Plaintiffs' counsel contacted Defendants County of Los Angeles' and Deputy Ty Shelton's ("Defendants") counsel in compliance with Local Rule 7-19 through 7-19.1. Defendants' counsel are:

Rickey Ivie, Esq.
rivie@imwlaw.com
Marina Samson, Esq.
msamson@imwlaw.com
Ivie McNeill Wyatt Purcell & Diggs
A Professional Law Corporation
444 South Flower Street, Suite 1800
Los Angeles, California 90071
Tel.: (213) 489-0028/Fax: (213) 489-0552

(Declaration of Hang D. Le (“Le Decl.”) ¶ 2). Defendants have indicated that pursuant to the Stipulation and Request for Order of Dismissal that they entered into with Plaintiffs (Dkt. No. 63), they do not oppose Plaintiffs’ Ex Parte Application. (Le Decl. ¶ 2). Plaintiffs seek *ex parte* relief because pursuant to 28 U.S.C. § 1367(d), Plaintiffs may only have 30 days to refile their state law claim(s) in state court after Plaintiffs’ state law claims are dismissed and thus, the deadline for Plaintiffs to refile any dismissed state law claims in state court may pass before the underlying motion may be heard according to regularly-noticed motion procedures.

1 DATED: July 30, 2025
2
3
4

**LAW OFFICES OF DALE K. GALIPO
BRAD GAGE LAW, APC**

5 By /s/ Hang D. Le
6 Dale K. Galipo
7 Bradley C. Gage
8 Hang D. Le
9 Attorneys for Plaintiffs
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION AND RELEVANT PROCEDURAL HISTORY	1
II.	EX PARTE BASIS FOR RELIEF	2
III.	GOOD CAUSE EXISTS FOR THE COURT TO RELIEVE PLAINTIFFS FROM THE COURT'S ORDER OF DISMISSAL	3
A.	The Court Did Not Have Jurisdiction Nor Discretion to Alter the Terms of the Parties' Stipulation for Dismissal.....	4
B.	Plaintiffs' State Law Claims Should Have Been Dismissed Without Prejudice	5
1.	Plaintiffs Plausibly Pled Claims for Battery, Negligence, and Violation of the Bane Act	7
2.	Plaintiffs Plausibly Pled Survival Claims.....	9
C.	Any Defects Under Plaintiffs' State Law Claims Can Be Cured	10
IV.	CONCLUSION	11

1 **TABLE OF AUTHORITIES**
2

3 Cases
4

5 <i>Abrego v. City of Los Angeles,</i> 6 No. CV1500039BROJEMX, 2016 WL 9450679 (C.D. Cal. Sept. 23, 2016) 11	
7 <i>Alves v. Cnty. of Riverside,</i> 8 135 F.4th 1161 (9th Cir. 2025).....	7, 8
9 <i>Ashcroft v. Iqbal,</i> 10 556 U.S. 662 (2009)	6
11 <i>Azam v. Brown,</i> 12 714 F. App'x 663 (9th Cir. 2017)	3
13 <i>B.B. v. Cnty. of Los Angeles,</i> 14 10 Cal. 5th 1 (2020).....	8
15 <i>B.B. v. Cnty. of Los Angeles,</i> 16 25 Cal. App. 5th 115 (2018).....	8
17 <i>Bell Atlantic Corp. v. Twombly,</i> 18 550 U.S. 544 (2007)	6
19 <i>Black Rock City, LLC v. Pershing Cnty. Bd. of Comm'rs,</i> 20 637 F. App'x 488 (9th Cir. 2016)	4
21 <i>Brown v. Ransweiler,</i> 22 171 Cal. App. 4th 516 (2009).....	7
23 <i>Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Systems, Inc.,</i> 24 637 F.3d 1047 (9th Cir. 2011).....	6
25 <i>Com. Space Mgmt. Co. v. Boeing Co.,</i> 26 193 F.3d 1074 (9th Cir. 1999).....	4
27 <i>Conley v. Gibson,</i> 28 355 U.S. 41 (1957)	7
29 <i>Davis v. Passman,</i> 30 442 U.S. 228 (1979)	6
31 <i>Est. of Risher v. City of Los Angeles,</i> 32 No. EDCV1700995MWFKKX, 2023 WL 5506005 (C.D. Cal. July 10, 2023) 33 	4
34 <i>Grant v. McAuliffe,</i> 35 41 Cal. 2d 859 (1953).....	9
36 <i>Gutierrez v. City of Woodland,</i> 37 No. CIV. S-10-1142 LKK, 2012 WL 1640509 (E.D. Cal. May 9, 2012)	11

1	<i>Hayes v. Cnty. of San Diego,</i> 57 Cal. 4th 622 (2013).....	8
2	<i>Hayes v. Cty. of San Diego</i> , No. 07CV1738 DMS (JMA), 2014 WL 11878351 (S.D. Cal. Apr. 3, 2014).....	11
4	<i>Hughes v. Rodriguez</i> , 31 F.4th 1211 (9th Cir. 2022).....	8
5	<i>Ileto v. Glock, Inc.</i> , 349 F.3d 1191 (9th Cir. 2003).....	6
7	<i>In re Yadidi</i> , 274 B.R. 843 (B.A.P. 9th Cir. 2002).....	10
9	<i>Jackson v. Fitzgibbons</i> , 127 Cal. App. 4th 329 (2005).....	9
10	<i>Klapprott v. United States</i> , 355 U.S. 601 (1949)	3
11	<i>Kokkonen v. Guardian Life Ins. Co. of Am.</i> , 511 U.S. 375 (1994)	5
13	<i>Mission Power Eng'g Co. v. Continental Cas. Co.</i> , 883 F.Supp. 488 (C.D. Cal. 1995).....	3
14	<i>Neitzke v. Williams</i> , 490 U.S. 319 (1989)	7
16	<i>Omar v. Sea-Land Serv., Inc.</i> , 813 F.2d 986 (9th Cir. 1987).....	5
18	<i>Orduno v. Hendrix</i> , No. EDCV162288DOCJDEX, 2017 WL 11705427 (C.D. Cal. Nov. 27, 2017)	11
19	<i>Quiroz v. Seventh Ave. Center</i> , 140 Cal. App. 4th 1256 (2006).....	9
21	<i>Reese v. Cnty. of Sacramento</i> , 888 F.3d 1030 (9th Cir. 2018).....	8
23	<i>Star Int'l v. Arizona Corp. Comm'n</i> , 720 F.2d 578 (9th Cir. 1983).....	6
24	<i>Swartz v. KPMG LLP</i> , 476 F.3d 756 (9th Cir. 2007).....	10
26	<i>United States v. Alpine Land & Reservoir Co.</i> , 984 F.2d 1047 (9th Cir. 1993).....	4
27	<i>United States v. Sparks</i> , 685 F.2d 1128 (9th Cir. 1982).....	3

1 *Wong v. Bell,*
2 642 F.2d 359 (9th Cir.1981).....5

3 Statutes

4 28 U.S.C. § 1367(d).....3
5 Cal. Civ. P. Code § 377.209
6 Cal. Civ. P. Code § 377.309
7 Cal. Civ. P. Code § 377.34(b).....9
8 Cal. Civ. P. Code § 377.609

9 Rules

10 Fed. R. Civ. P. 60(b)(6)3
11

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY**

3 This case arises out of the officer-involved shooting death of Niani Finlayson
4 (“Decedent”) by County of Los Angeles Sheriff’s Deputy Ty Shelton on December
5 4, 2023. The Plaintiffs are Decedent’s minor children, X.D. and X.C. Plaintiffs
6 initiated this action on April 24, 2024, bringing claims individually and as
7 Decedent’s successors in interest for (1) Unreasonable Search and Seizure (42
8 U.S.C. § 1983); (2) Civil Battery; (3) Wrongful Death; (4) Negligence; (5) Bane
9 Act; and (6) Municipal Liability (42 U.S.C. § 1983) (Dkt. No. 1). Plaintiffs filed a
10 First Amended Complaint, the operative complaint, on July 23, 2024, alleging the
11 same claims (Dkt. No. 24).

12 The parties were diligently pursuing discovery, including the retention of
13 experts and the completion of expert depositions. Recently, due to Plaintiffs’
14 concerns regarding the second prong of qualified immunity on Plaintiffs’ Fourth
15 Amendment claim, the parties have been engaged in discussions regarding the
16 possibility of resolving this action. On July 24, 2025, pursuant to ongoing settlement
17 discussions between Plaintiffs’ counsel and Defendants County of Los Angeles’ and
18 Ty Shelton’s (“Defendants”) counsel, the parties filed a Stipulation and Request for
19 Order of Dismissal (“Stipulation”), stipulating and requesting that the Court enter an
20 order dismissing Plaintiffs’ federal claims (the First Amended Complaint’s First and
21 Sixth Claims for Relief) with prejudice, and dismissing Plaintiffs state law claims
22 (the First Amended Complaint’s Second, Third, Fourth, and Fifth Claims for Relief)
without prejudice, so that Plaintiffs may refile the state law claims in state court
23 (Dkt. No. 63). The parties specifically agreed to the dismissal of the federal claims,
24 with prejudice, and the refiling of the state law claims in state court in exchange for
25 the Defendants not filing a Motion for Summary Judgment in federal court in order
26 for the Defendants not filing a Motion for Summary Judgment in federal court in order
27
28

1 to better facilitate the possibility of a resolution in the case. (See Dkt. No. 63 ¶ 9). A
2 proposed order was filed with the Stipulation reflecting the terms of the Stipulation.

3 On July 25, 2025, the Court issued an Order regarding the parties' Stipulation
4 and Request for Order of Dismissal, but made changes to the terms of the dismissal.
5 Specifically, instead of dismissing all of Plaintiffs' state law claims *without*
6 *prejudice* to allow Plaintiffs to refile those claims in state court pursuant to the
7 parties' agreement, the Court dismissed Plaintiffs' state law battery, negligence, and
8 Bane Act claims *with prejudice*. The Court did not provide an explanation for the
9 change to the terms of the parties' stipulation other than a short statement in the
10 prefatory paragraph of the Order, indicating that the Court considered the parties'
11 Stipulation and "the files and records of the case [and] the applicable law." (Dkt.
12 No. 64).

13 Plaintiffs now file this Unopposed Ex Parte Application seeking relief from
14 the Court's July 25, 2025 Order re Stipulation and Request for Order of Dismissal.
15 Specifically, Plaintiffs request that the Court issue an amended order to reflect the
16 parties' agreed-upon terms and stipulation and agreement and dismiss Plaintiffs'
17 state law claims of battery, negligence, and Bane Act without prejudice. Should the
18 Court desire further discussion on any of the issues discussed herein, Plaintiffs
19 counsel can be made available for a hearing either via personal appearance or Zoom.
20 Plaintiff's lead counsel, Dale Galipo, is unavailable from August 4-August 8, 2025
21 but can otherwise work with the Court to attend a hearing if needed.

22 **II. EX PARTE BASIS FOR RELIEF**

23 The granting of *ex parte* relief requires an evidentiary showing of good cause
24 that: (1) "the moving party's cause will be irreparably prejudiced if the underlying
25 motion is heard according to regular noticed motion procedures;" and (2) "the
26 moving party is without fault in creating the crisis that requires *ex parte* relief, or
27 that the crisis occurred as a result of excusable neglect." See *Mission Power Eng'g*

1 *Co. v. Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal. 1995); *see, e.g., Azam*
2 *v. Brown*, 714 F. App'x 663, 665 (9th Cir. 2017) (recognizing *Mission Power* as
3 setting forth standard for *ex parte* relief).

4 Here, Plaintiffs' ability to fully control, litigate, and negotiate to settle their
5 case will be irreparably prejudiced if the underlying motion is heard according to
6 regularly noticed motion procedures because pursuant to 28 U.S.C. § 1367(d),
7 Plaintiffs only have 30 days to refile any state law claims that were joined with
8 federal claims in federal court pursuant to the Court's supplemental jurisdiction and
9 subsequently dismissed. And while Plaintiffs acknowledge that the parties stipulated
10 that any applicable state of limitations for Plaintiffs' state law claims are tolled until
11 Plaintiffs refile their state law claims in state court (*see* Dkt. No. 63 ¶ 7), due to the
12 novel circumstances Plaintiffs face, Plaintiffs intend to comply with the 30-day
13 deadline pursuant to 28 U.S.C. § 1367(d) out of an abundance of caution.
14 Additionally, Plaintiffs are without fault in causing this *ex parte* crisis as Plaintiffs
15 entered into a stipulation with Defendants in which the parties agreed that Plaintiffs'
16 state law claims would be dismissed *without prejudice* and requested the Court issue
17 an order reflecting the parties' agreement, thereby fully intending to be able to file
18 their state law claims in state court in a timely manner pursuant to the parties'
19 stipulation, but the Court subsequently issued an order dismissing Plaintiffs' state
20 law battery, negligence, and Bane Act claims *with prejudice*.

21 **III. GOOD CAUSE EXISTS FOR THE COURT TO RELIEVE**
22 **PLAINTIFFS FROM THE COURT'S ORDER OF DISMISSAL**

23 Rule 60(b)(6) provides that, “[o]n motion and just terms, the court may
24 relieve a party or its legal representative from a final judgment, order or proceeding
25 for...any...reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). This clause “gives
26 the district court power to vacate judgments [or final orders] ‘whenever such action
27 is appropriate to accomplish justice.’” *United States v. Sparks*, 685 F.2d 1128, 1130
28 (9th Cir. 1982) (quoting *Klapprott v. United States*, 355 U.S. 601, 615 (1949)). An

1 order dismissing all claims in a complaint is considered a final order for the
2 purposes of relief under Rule 60(b)(6). *See Est. of Risher v. City of Los Angeles*, No.
3 EDCV1700995MWFKKX, 2023 WL 5506005, at *3 (C.D. Cal. July 10, 2023).
4 Relief is granted under Rule 60(b)(6) if a party can show both injury and that
5 circumstances beyond its control prevented timely action to protect its interests. *See*
6 *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993).

7 Here, Plaintiffs seek relief from the Court's July 25, 2025 Order re Stipulation
8 and Request for Order of Dismissal, which disposes of all of Plaintiffs' claims.
9 Specifically, Plaintiffs seek amendment of the Court's Order dismissing Plaintiffs'
10 state law battery, negligence, and Bane Act claims with prejudice. As discussed
11 further below, Plaintiffs contend that such departure from the parties' stipulated
12 terms of dismissal is prejudicial to Plaintiffs, and circumstances beyond Plaintiffs'
13 control prevented timely action to protect Plaintiffs' interests as Plaintiffs were not
14 aware and were not given notice that the Court was contemplating and would be
15 dismissing the majority of Plaintiffs' state law claims with prejudice before the
16 Order was issued.

17 **A. The Court Did Not Have Jurisdiction Nor Discretion to Alter the**
18 **Terms of the Parties' Stipulation for Dismissal**

19 At the outset, Plaintiffs contend that the Court did not have jurisdiction to
20 alter the terms of the parties' Stipulation to dismiss the action pursuant to Rule
21 41(a)(1)(A)(ii). A voluntary dismissal by way of stipulation under Rule
22 41(a)(1)(A)(ii) "automatically terminates the action, and thus federal jurisdiction,
23 without judicial involvement." *Com. Space Mgmt. Co. v. Boeing Co.*, 193 F.3d
24 1074, 1076 (9th Cir. 1999); *see Black Rock City, LLC v. Pershing Cnty. Bd. of*
25 *Comm'rs*, 637 F. App'x 488, 489 (9th Cir. 2016). "[O]nce a [] voluntary dismissal is
26 filed, the district court in which the action is pending loses jurisdiction and cannot
27 exercise discretion with respect to the terms and conditions of the dismissal." *Com.*
28 *Space Mgmt. Co.*, 193 F.3d at 1076. The parties may confer the district court limited

1 jurisdiction under a stipulated dismissal pursuant to Rule 41(a)(1)(ii), such as
2 jurisdiction to enforce the terms of a settlement or jurisdiction to issue a dismissal
3 order that embodies the settlement agreement. *See Kokkonen v. Guardian Life Ins.*
4 *Co. of Am.*, 511 U.S. 375, 381-82 (1994). Here, the parties requested that the Court
5 issue a specific order of dismissal reflecting the parties' agreement that Plaintiffs'
6 federal claims be dismissed with prejudice and Plaintiffs' state law claims be
7 dismissed without prejudice. (Dkt. No. 63 ¶ 10). The Court did not have jurisdiction
8 nor discretion to alter the terms of the parties' Stipulation.

9 **B. Plaintiffs' State Law Claims Should Have Been Dismissed Without**
10 **Prejudice**

11 Even assuming *arguendo* that the Court had jurisdiction to alter the terms of
12 the parties' Stipulation for dismissal, despite clear case law to the contrary,
13 dismissal of Plaintiffs' state law claims for battery, negligence, and Bane Act with
14 prejudice is unduly prejudicial, an abuse of discretion, and in contravention of
15 established law. Because the Court did not provide a clear explanation for the
16 changes to the terms of the parties' Stipulation, Plaintiffs can only speculate as to
17 the grounds of the Court's dismissal of Plaintiffs' battery, negligence, and Bane Act
18 claims with prejudice. Based on the short statement provided by the Court and a
19 review of the documents available to the Court, Plaintiffs assume that these *sua*
20 *sponte* dismissals were made pursuant to Rule 12(b)(6) of the Federal Rules of Civil
21 Procedure as no substantive evidence relating to the facts of this case have been
22 provided to the Court.

23 A court may *sua sponte* dismiss a claim under Rule 12(b)(6) but must give
24 notice of its *sua sponte* intention to dismiss and provide the plaintiff with "an
25 opportunity to at least submit a written memorandum in opposition to such motion"
26 *Wong v. Bell*, 642 F.2d 359, 362 (9th Cir.1981), unless the Plaintiff cannot possibly
27 win relief, *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987). Because
28 the Court *sua sponte* dismissed Plaintiffs' battery, negligence, and Bane Act claim

1 without prior notice, it stands to reason that the Court has determined that Plaintiffs
2 cannot possibly win relief under these claims based on the facts pled in Plaintiffs'
3 First Amended Complaint. However, without an explanation, Plaintiffs are at a loss
4 as to how the Court came to this conclusion, as Plaintiffs contend that the pleadings,
5 when read liberally pursuant to 12(b)(6) standards, are sufficient for their battery,
6 negligence, and Bane Act claims.

7 Federal Rule of Civil Procedure 12(b)(6) must be read in conjunction with
8 Federal Rule of Civil Procedure 8, which "marks a notable and generous departure
9 from the hypertechnical, code-pleading regime of a prior era." *Ashcroft v. Iqbal*, 556
10 U.S. 662, 678 (2009). Rule 8 requires the plaintiff to make only (1) a short and plain
11 statement of the court's jurisdiction, (2) a short and plain statement of the claim
12 showing that the plaintiff is entitled to relief, and (3) a demand for judgment and
13 relief. *Davis v. Passman*, 442 U.S. 228 (1979); *Ileto v. Glock, Inc.*, 349 F.3d 1191,
14 1200 (9th Cir. 2003). Under federal notice pleading, the complaint must allege
15 "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*
16 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[O]nce a claim has been stated
17 adequately, it may be supported by showing any set of facts consistent with the
18 allegations in the complaint." *Id.* at 563. In deciding whether a pleading states a
19 plausible claim for relief, the court considers the complaint's factual allegations,
20 "together with all reasonable inferences" from those allegations. *Cafasso, U.S. ex*
21 *rel. v. Gen. Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "A
22 claim has facial plausibility when the plaintiff pleads factual content that allows the
23 court to draw the reasonable inference that the defendant is liable for the misconduct
24 alleged." *Ashcroft*, 556 U.S. at 662.

25 In reviewing a dismissal for failure to state a claim under Federal Rule of
26 Civil Procedure Rule 12(b)(6), the Court must accept all material allegations in the
27 complaint as true and construe them in the light most favorable to the plaintiff. *N.*
28 *Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983). In *Conley v.*

1 *Gibson*, 355 U.S. 41 (1957), the United States Supreme Court explained that
2 dismissal for failure to state a claim should only be granted under narrow
3 circumstances, and complaints should not be dismissed unless it appears beyond
4 doubt that the plaintiff cannot prove any facts supporting her claim entitling her to
5 relief. *Conley*, 355 U.S. at 45-46. “Rule 12(b)(6) [also] authorizes a court to dismiss
6 a claim on the basis of a dispositive issue of law.” *Neitzke v. Williams*, 490 U.S. 319,
7 326 (1989).

8 1. Plaintiffs Plausibly Pled Claims for Battery, Negligence, and Violation
9 of the Bane Act

10 The elements of civil battery are: (1) defendant intentionally
11 performed an act that resulted in a harmful or offensive contact with
12 the [decedent’s] person; (2) [decedent] did not consent to the contact;
13 and (3) the harmful or offensive contact caused injury, damage, loss
14 or harm to [decedent].

15 *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 526-27 (2009). “A state law battery
16 claim is a counterpart to a federal claim of excessive use of force. In both, a plaintiff
17 must prove that the peace officer’s use of force was unreasonable.” *Id.* at 527. Here,
18 Plaintiffs plausibly pled a claim for battery by a peace officer. Plaintiffs alleged that
19 Defendant Ty Shelton intentionally shot and killed Decedent, that Decedent did not
20 consent to the contact, and that Decedent died as a result of the shooting. (FAC, Dkt.
21 No. 24 ¶¶ 35, 48). Plaintiffs further alleged that the other two deputies at the scene
22 did not shoot, that Decedent did not pose an immediate threat to the safety or anyone
23 at the time of the shooting, and that Decedent was shot several times in the back in
24 front of her daughter without justification. (FAC, Dkt. No. 24 ¶¶ 27-29). Based on
25 these allegations, Plaintiffs plausibly pled a claim for state law battery.

26 “Under California negligence law, a plaintiff must show that the defendant
27 has a legal duty of due care, a breach of such legal duty, and the breach was a
28 proximate or legal cause of the resulting injury.” *Alves v. Cnty. of Riverside*, 135
F.4th 1161, 1170 (9th Cir. 2025) (cleaned up). “The California Supreme Court has

1 long recognized that law enforcement officers have a duty to act reasonably when
2 using deadly force against a suspect.” *Id.* (citing *Hayes v. Cnty. of San Diego*, 57
3 Cal. 4th 622, 629 (2013)). Thus, officers can be liable for negligence under
4 California law if their pre-shooting conduct show that, as a part of the totality of the
5 circumstances, their use of force was unreasonable. *Hayes*, 57 Cal. 4th at 639. Here,
6 Plaintiffs have plausibly pled a claim for state law negligence. Plaintiffs alleged that
7 Defendant Ty Shelton had a duty to use reasonable care to prevent harm or injury to
8 others and that he breached that duty when he failed to adequately assess the need to
9 use deadly force against Decedent, used negligent tactics, including negligent pre-
10 shooting tactics, and negligently used deadly force against Decedent. (FAC, Dkt.
11 No. 24 ¶¶ 63-64).

12 “The elements of a Bane Act claim are essentially identical to the elements of
13 a § 1983 claim, with the added requirement that the government official had a
14 ‘specific intent to violate’ a constitutional right.” *Hughes v. Rodriguez*, 31 F.4th
15 1211, 1224 (9th Cir. 2022) (citing *Reese v. Cnty. of Sacramento*, 888 F.3d 1030,
16 1043 (9th Cir. 2018)). To succeed on a claim under the Bane Act, a plaintiff must
17 only show that the defendant acted with a specific intent to violate the plaintiff’s
18 civil rights. *B.B. v. Cnty. of Los Angeles*, 25 Cal. App. 5th 115, 133 (2018) (rev’d on
19 other grounds in *B.B. v. Cnty. of Los Angeles*, 10 Cal. 5th 1 (2020)). “[A] reckless
20 disregard for a person’s constitutional rights is evidence of specific intent to deprive
21 that person of those rights.” *Reese*, 888 F.3d at 1045. Plaintiffs plausibly and
22 sufficiently alleged a Bane Act claim in stating that Defendant Shelton shot and
23 killed Decedent without justification while Decedent did not pose an immediate
24 threat to anyone and did so with the intent to deprive Decedent of her enjoyment of
25 the interests protected by federal and state laws. (FAC, Dkt. No. 24 ¶¶ 27-29, 70).

26 //

27 //

28 //

2. Plaintiffs Plausibly Pled Survival Claims

Under California law, “survival actions” are distinguished from “wrongful death” actions. A wrongful death action is an independent claim brought by a decedent’s heirs for damages they personally suffered on account of the death. *See* Cal. Civ. P. Code § 377.60; *Jackson v. Fitzgibbons*, 127 Cal. App. 4th 329, 335 (2005). A survival action, on the other hand, is not a new cause of action that vests in the heirs on the death of the decedent. *Quiroz v. Seventh Ave. Center*, 140 Cal. App. 4th 1256, 1265 (2006); *see* Cal. Civ. P. Code § 377.20. “It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute survives that event.” *Id.* The survival statute “prevent[s] the abatement of the cause of action of the injured person, and provide[s] for its enforcement by or against the personal representative of the deceased.” *Grant v. McAuliffe*, 41 Cal. 2d 859, 864 (1953). A cause of action that survives the death of a person passes to the person’s successor in interest and is enforceable by the successor in interest. Cal. Civ. P. Code § 377.30.

In the operative complaint, Plaintiffs state that they are bringing claims “as an individual in her own right” and “as a successor in interest, heir, and personal legal representative of the decedent to seek redress for the deprivation of the decedent’s rights and for those damages that the decedent sustained and incurred before death, and the decedent would have been entitled to recover, had she lived as defined by Section 377.34 of the California Code of Civil Procedure. (FAC, Dkt. No. 24 ¶¶ 4, 5). This is based on the injuries and damages Decedent sustained before she passed, including pain and suffering¹ and economic damages, and wrongful death damages

²⁵ 1 California Code of Civil Procedure, section 377.34(b) provides that “in an action
26 or proceeding by a decedent’s personal representative or successor in interest on the
27 decedent’s cause of action, the damages recoverable may include damages for pain,
28 suffering, or disfigurement of the action or proceeding...was filed on or after
(footnote continued)

1 that Plaintiffs personally sustained as a result of Decedent's death. (*See* FAC, Dkt.
2 No. 24 ¶¶ 35, 48, 49, 50, 51, 57, 58, 59, 73, 74). It can be reasonably inferred from a
3 liberal reading of the operative complaint that Plaintiffs brought their battery,
4 negligence, and Bane Act claims not only as wrongful death claims, but also as
5 survival claims on behalf of Decedent as her successors in interest, since Plaintiffs
6 sought survival damages on her behalf under these claims. (*See* FAC, Dkt. 24 ¶¶ 48,
7 49, 67, 73). Thus, by dismissing Plaintiffs' battery, negligence, and Bane Act claim,
8 with prejudice, the Court dismissed all of Plaintiffs' survival claims that Plaintiffs
9 adequately pled and were entitled to bring as Decedent's successors in interest under
10 California law.

11 **C. Any Defects Under Plaintiffs' State Law Claims Can Be Cured**

12 While Plaintiffs contend that Plaintiffs plausibly and sufficiently pled their
13 state law claims for battery, negligence, and Bane Act, to the extent that the Court
14 found the allegations in Plaintiffs' First Amended Complaint to be conclusory,
15 vague, lacking or defective in any manner, a defective complaint should not be
16 subject to a dismissal with prejudice without the opportunity to amend unless it is
17 clear that no relief can be granted under any set of facts that can be proved to
18 support its allegations or the complaint cannot be saved by any amendment. *See*
19 *Swartz v. KPMG LLP*, 476 F.3d 756, 760 (9th Cir. 2007); *In re Yadidi*, 274 B.R.
20 843, 849 (B.A.P. 9th Cir. 2002). Here, Plaintiffs can plead more detailed facts if
21 needed to support their allegations and state law claims. To the extent that the Court
22 dismissed Plaintiffs' state law claims on the basis that Plaintiffs failed to file
23 declarations in compliance with section 377.32 of the California Code of Civil
24 Procedure in order to bring claims on behalf of Decedent as Decedent's successors
25

26
27 January 1, 2022 and before January 1, 2026. Plaintiffs filed this action on April 24,
28 2024 and are therefore entitled to recover damages for pain and suffering on behalf
of decedent as decedent's successors in interest.

1 in interest, Plaintiffs can also cure this defect by filing the requisite declarations
2 when Plaintiffs refile their state law claims in state court, as permitted by law. *See*
3 *Orduno v. Hendrix*, No. EDCV162288DOCJDEX, 2017 WL 11705427, at *7 (C.D.
4 Cal. Nov. 27, 2017); *Abrego v. City of Los Angeles*, No. CV1500039BROJEMX,
5 2016 WL 9450679, at *5–6 (C.D. Cal. Sept. 23, 2016); *Hayes v. Cty. of San Diego*,
6 No. 07CV1738 DMS (JMA), 2014 WL 11878351 (S.D. Cal. Apr. 3, 2014);
7 *Gutierrez v. City of Woodland*, No. CIV. S–10–1142 LKK, 2012 WL 1640509, at
8 *6–7 (E.D. Cal. May 9, 2012). Accordingly, Plaintiffs’ battery, negligence, and Bane
9 Act claims should be dismissed without prejudice because any defects can be cured.

10 **IV. CONCLUSION**

11 For the foregoing reasons, Plaintiffs respectfully request the Court issue an
12 amended Order of Dismissal, reflecting the agreed-upon terms of the parties’
13 Stipulation and dismissing Plaintiffs’ state law claims of battery, wrongful death,
14 negligence, and Bane Act without prejudice, so as to honor the specific agreement
15 of the parties, allow the state law claims to proceed and be adjudicated in state court,
16 and give the parties the best chance of resolution of the case.

17
18
19
20 DATED: July 30, 2025

**LAW OFFICES OF DALE K. GALIPO
BRAD GAGE LAW APC**

21
22 Bv /s/ Hang D. Le
23 Dale K. Galipo
24 Bradley C. Gage
25 Hang D. Le
26 Attorneys for Plaintiffs